

DECLUES, BURKETT & THOMPSON, LLP

EXEMPT FROM FEES PER: GOVERNMENT CODE SECTION 6103

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**UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA**

JOHN ESPINOZA, an individual,

Plaintiff,

vs.

CITY OF IMPERIAL, a public entity;
 MIGUEL COLON, an individual; IRA
 GROSSMAN, an individual; and DOES
 1 THROUGH 50, inclusive,

Defendants.

CASE NO.: 07CV2218 LAB (RBB)

Complaint Filed: 11/20/07

*Judge Larry A. Burns
 Courtroom 9*

**REPLY TO OPPOSITION TO ANTI-
 SLAPP MOTION OF CITY OF
 IMPERIAL AND MIGUEL COLON**

ORAL ARGUMENT REQUESTED

**Date: July 14, 2008
 Time: 11:15 a.m.
 Courtroom: 9**

1. THE ANTI-SLAPP MOTION WAS TIMELY BROUGHT.

Plaintiff has incorrectly asserted that CITY and COLON did not timely bring the Anti-SLAPP Motion. Federal Rule of Civil Procedure 12 does not apply to that motion. Yet, application of Rule 12(g) and (h) are expressly limited to motions allowed by Rule 12.

**2. THE ANTI-SLAPP MOTION DOES NOT DIRECTLY COLLIDE WITH
 THE FEDERAL RULES OF CIVIL PROCEDURE.**

CITY and COLON submit that the Anti-SLAPP Motion does not collide with the Federal Rules of Civil Procedure. Plaintiff's reliance on *United States ex rel. Newsham v.*

1 *Lockheed Missile & Space Co., Inc.* 190 F.3d 963, 970-973 (9th Cir. 1999) is misplaced.
 2 *Newsham* found that the District Court had erred in ruling that the Anti-SLAPP motion
 3 could not be applied to the counterclaim then before it. *Id.*

4 3. **THE COURT MAY PROPERLY REACH THE MERITS OF THE ANTI-**
 5 **SLAPP MOTION.**

6 In the Anti-SLAPP Motion, CITY and COLON have demonstrated that this suit
 7 falls within the provisions of Code of Civil Procedure §425.16. Plaintiff has made no
 8 effort to address *The Governor Gray Davis Committee v. American Taxpayers Alliance*,
 9 102 Cal.App.4th 449, 125 Cal.Rptr.2d 534 (2002), *Briggs v. Eden Council for Hope and*
 10 *Opportunity*, 19 Cal.4th 1106, 81 Cal.Rptr.2d 471 (1999), *Kibler v. Northern Inyo County*
 11 *Local Hospital District*, 39 Cal.4th 192, 199, 46 Cal.Rptr.3d 41 (2006), *City of Cotati v.*
 12 *Cashman*, 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519 (2002), *Fox Searchlight Pictures, Inc. v.*
 13 *Paladino*, 89 Cal.App.4th 294, 308, 106 Cal.Rptr.2d at 906 (2001), or *Avrill v. Superior*
 14 *Court (Eli Home)*, 42 Cal.App.4th 1173, 50 Cal.Rptr.2d 62 (1996). Yet, each of these
 15 cases was cited in the Anti-SLAPP Motion. Pursuant to each of these cases, it is apparent
 16 that CITY and COLON have carried their burden on the Anti-SLAPP Motion.

17 4. **THE COURT NEED NOT CONTINUE THIS MOTION TO PERMIT**
 18 **PLAINTIFF TO ENGAGE IN DISCOVERY.**

19 In opposition to the Anti-SLAPP Motion, plaintiff has asserted an entitlement to a
 20 continuance to permit discovery. Plaintiff has relied upon *Metabolife International, Inc. v.*
 21 *Warnick*, 264 F.3d 832, 845-847 (9th Cir. 2001) and *Rogers v. Home Shopping Network,*
 22 *Inc.*, 57 F.Supp.2d 973 (C.D. Cal. 1999). However, review of *Rogers* reveals that the
 23 Court recognized two types of Anti-SLAPP motions. One type is an attack on the
 24 adequacy of the pleading, and the second type is an attack on plaintiff's inability to carry
 25 the burden of proof. 57 F.Supp.2d at 981. The Court compared the second type of Anti-
 26 SLAPP motion with a motion for summary judgment. However, the Court noted that the
 27 continuance was to permit "necessary discovery." *Id.* The Court also explained that the
 28 tendency toward leniency in discovery is strengthened when the summary judgment

1 motion raises latent fact issues such as motive, intent, knowledge or credibility and the
2 moving party has exclusive control over those facts. *Id.*

3 Here, plaintiff has simply argued that this Court may properly grant the requested
4 continuance. Plaintiff has not argued that there is necessary evidence which is not in
5 plaintiff's possession. In fact, given the allegations of the First Amended Complaint it
6 appears plaintiff has all of the information plaintiff should need. Plaintiff allegedly was
7 informed of the reason for the alleged termination. (FAC 8:26-28) As demonstrated by
8 the Declaration of Vincent J. Tien in Opposition to Defendant Ira Grossman's Anti-SLAPP
9 Motion to Strike Plaintiff's Complaint, and the exhibit attached thereto, plaintiff has at
10 least begun administrative hearing regarding plaintiff's employment with CITY. Plaintiff
11 has offered no reason plaintiff cannot present the evidence necessary to oppose the Anti-
12 SLAPP Motion.

13 Plaintiff's reliance upon Government Code §21153 and *Lazan v. County of*
14 *Riverside*, 140 Cal.App.4th 453, 44 Cal.Rptr.3d 394 (2006) do not assist plaintiff. Here,
15 plaintiff's argument suffers the same defect as the County in *Lazan*. Plaintiff's arguments
16 are contradictory. Plaintiff has asserted that plaintiff could perform the essential functions
17 of the employment with CITY with or without reasonable accommodations. Yet, plaintiff
18 has also asserted that CITY should have sought a disability retirement for plaintiff
19 pursuant to §21153. *Lazan* Court would not permit plaintiff to be placed in such a "Catch
20 22." 140 Cal.App.4th at 462-463, 44 Cal.Rptr.3d 394. Here, this Court may properly
21 prevent plaintiff from placing CITY and COLON in such a "Catch-22." Furthermore,
22 examination of *Lazan* reveals that it is an action for a writ of mandate. Plaintiff has not
23 sought a writ of mandate in this Court.

24 Similarly, plaintiff's reliance upon this Court's Standing Order in Civil Cases, Rule 4
25 (h) does not assist plaintiff. The Anti-SLAPP Motion does not fall within the provisions of
26 that Rule.

27 However, in the event the Court finds plaintiff requires additional time for
28 discovery, CITY and COLON request this Court continue the Anti-SLAPP Motion, rather

1 than denying it.

2 Moreover, examination of the Anti-SLAPP Motion reveals that at least the last two
3 points are attacks upon the pleading, as opposed to attacks which require the presentation
4 of evidence. The last two points in the Anti-SLAPP Motion are that Civil Code §47 and
5 Government Code §821.6 provide defenses. Plaintiff has not addressed these issues. The
6 Court may properly grant the Anti-SLAPP Motion.

7 **5. CONCLUSION.**

8 For the reasons set forth in the Anti-SLAPP Motion, and above, this Court may
9 properly grant the Anti-SLAPP Motion brought by CITY OF IMPERIAL and MIGUEL
10 COLON.

11
12 Dated: July 7, 2008

DECLUES, BURKETT & THOMPSON, LLP

13
14 BY: s/J. Thompson

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JENNIFER K. BERNEKING, Esq.

16 Attorneys for Defendants, **CITY OF IMPERIAL,**
17 (a public entity) and **MIGUEL COLON**
(employee of a public entity)

PROOF OF SERVICE
(C.C.P. section 1013a(3))

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS.

I am over the age of 18 and I am not a party to the within action. I am employed by **DECLUES, BURKETT & THOMPSON, LLP**, in the County of Orange, at 17011 Beach Blvd., Ste. 400, Huntington Beach, California, 92647-5995.

On **July 7, 2008**, I served the attached: **REPLY TO OPPOSITION TO ANTI-SLAPP MOTION OF CITY OF IMPERIAL AND MIGUEL COLON**

On the interested parties in this action by:

XXX Placing true copies thereof in sealed envelopes, addressed as described below.

Vincent J. Tien
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XXX BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Huntington Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

BY PERSONAL SERVICE: I caused such an envelope to be delivered by hand to the offices of the addressees.

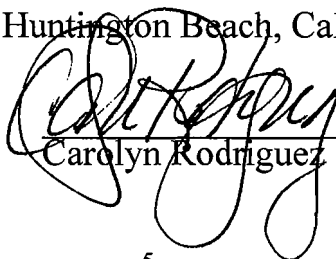
BY FEDERAL EXPRESS (Receipt/Airbill No.: _____)

BY FACSIMILE TRANSMISSION: From FAX NO. (714) 843-9452 to FAX No.: _____ at or about Time, directed to Name. The facsimile machine I used complied with Rule 2003(3), and no error was reported by the machine. Pursuant to Rule 2005(I), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration.

XXX FEDERAL: I declare I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed on **July 7, 2008**, at Huntington Beach, California.



Carolyn Rodriguez